

FREEDOM OF THE PRESS

**A STUDY OF THE LEGAL DOCTRINE OF
"QUALIFIED PRIVILEGE"**

SAMUEL ARTHUR DAWSON

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A STUDY OF THE LEGAL DOCTRINE OF
"QUALIFIED PRIVILEGE"

BY

SAMUEL ARTHUR DAWSON

M. S. IN JOURNALISM, COLUMBIA UNIVERSITY

WITH A FOREWORD BY

HENRY WOODWARD SACKETT

OF THE NEW YORK BAR



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FOREWORD

IN the history of the development of the Freedom of the Press, nothing is more interesting or important than that phase of it which relates to "privileged" publications. The doctrine of qualified privilege, as now enunciated by our courts and legislatures, has been one of extremely slow growth. It has only reached its ripest fruition within the present century. Nowhere has it flourished with such uniform vigor and persistency as in America and nowhere has it reached a more complete development than in the State of New York.

The heart of the doctrine of qualified privilege is the right of the people of a free nation to have published for their information what their rulers — their public officials — are doing, whether in their legislatures, in their courts or while acting in any other public and official capacity. Since the publication of newspapers be-

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gan, the press has been the only adequate avenue of public information regarding such official acts. The people themselves, especially in English speaking countries, have insisted upon the right to this information; and the refusal or reluctance of the governing officials to concede it led to the long struggle, lasting for centuries, for this most essential form of freedom of the press.

The story of that struggle is one of the most interesting and important in the history of England and America. Particularly is this true in the light of recent liberal interpretations of the doctrine of qualified privilege by the highest courts of such States as New York and Illinois, in which are published the greatest American newspapers, if not the greatest in the world.

Mr. Samuel Arthur Dawson, the author of this little treatise, has told this story clearly, concisely and with engaging simplicity of style, yet with accuracy and with fine discrimination as to the most salient and vital points of the great his-

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toric struggle. In fact, I do not know of any other published work in which the history of this development is separately told and at the same time so adequately treated, whatever the size of that work may be. There certainly is none in which the matter is so satisfactorily covered within the same space.

It represents the fruits of a year of study and research by a talented and accurate young scholar. Its usefulness promises to be marked.

HENRY W. SACKETT.

SCHOOL OF JOURNALISM

COLUMBIA UNIVERSITY

New York, June, 1924

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THE SCOPE OF QUALIFIED PRIVILEGE

LIBERTY of opinion — greatest of all liberties — has been the last political right to be gained by the people. Although prized in all ages, the right to express an opinion was subject for centuries to the royal prerogative. The government was above public opinion; it ruled, except in times of crisis, without regard for the wishes of the people.

The rise of Parliaments was but a slight beginning, for public opinion was still inarticulate. No longer was it a matter of denial by a king, it is true; now the restrictions were imposed by the representatives of the people themselves and by the judicial officers of the realm; yet public opinion, denied the means of ascertaining the proceedings of Parliament and the courts, could be of little influence. At

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the foundation of democracy and representative government lies the right of free publication of the doings of those in authority, for no true public opinion can be formed without accurate knowledge of those facts. That is why, today, the news columns of our newspapers concern the public more than the editorial pages. That is why qualified privilege has come to be prized as one of the chief requisites of democracy.

Qualified privilege is the right of citizens of a liberal government to publish, without malice, fair and true reports of judicial, legislative or other public and official proceedings. It protects publications of such reports from actions for libel.

Before qualified privilege can be adequately understood, it is necessary, briefly, to define libel. Two English decisions might well be quoted here to show its vast extent. In *O'Brien v. Clement* (15 M. & W. 435) it was held: "Everything, printed or written, which reflects on the character of another, and is published

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without lawful justification or excuse, is a libel, whatever the intention may have been." And Lord Loreburn, in *Hulton v. Jones* (1910 A. C. 23) declared libel to be a tort "which consists in using language which others knowing the circumstances would reasonably think to be defamatory of the person complaining of and injured by it." These definitions show what a vast percentage of the items printed in a daily newspaper are libelous. How then is the press protected?

There are three defenses for the libels daily appearing in the press. The first is the right to prove the truth of the facts of the alleged libel. The second is qualified privilege. The third is criticism or fair comment. At first all three were denied, and then little by little these cardinal rights were won by the press. At times the fight was clearly concentrated on one of them; at times all three were so intricately involved in the common struggle as to be almost one issue; often a victory for one meant a corresponding advance for another.

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Herein we shall deal, as exclusively as may be, with the second — qualified privilege. However, when it appears necessary to outline an historical victory or a significant gain in the long struggle for the first or the third, we shall do so — being as brief as possible, and limiting our discussion to such points as, directly or indirectly, indicate important effects on qualified privilege.

Modern democracy could not exist under the old rule — “the greater the truth the greater the libel.” It would cease to function were the proceedings of the legislatures and the courts guarded from public knowledge. It would be a farce were the people denied the right of criticism and fair comment on the acts of their officials. Thus do the three combine in upholding the present status of society.

Qualified privilege is now a recognized and indisputable right. The New York Penal Law, in Article 126, Section 1345, provides:

A prosecution for libel can not be maintained against a reporter, publisher, editor, or

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proprietor of a newspaper for publication therein of a fair and true report of any judicial, legislative or other public and official proceeding or of any statement, speech, argument or debate in the course of same, without proving actual malice in making the report. This does not apply to headlines or additions.

And this is extended by the New York Practice Act, Articles 337 and 338, to cover civil suits as well as criminal prosecutions:

An action, civil or criminal, cannot be maintained against a reporter, editor, publisher or proprietor of a newspaper for the publication therein of a fair and true report of any judicial, legislative, or other public and official proceedings, without proving actual malice in making the report.

The last section does not apply to a libel contained in the heading of the report; or in any other matter added by any person concerned in the publication; or in any report of anything said or done at the time or place of the public and official proceedings which was not a part thereof.

This definition of qualified privilege will be used herein. It should be carefully

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noted here that the privilege granted the press is limited and not identical with that granted to the lawful participants in public and official proceedings themselves, whose privilege is absolute, without regard to the question of malice.

Absolute privilege applies to utterances or printed publications made in the course of lawful proceedings in the legislature or the court room or in the fulfillment of executive duties. It appertains only to officials of government, legislators, judges or witness and counsel, and has no application whatsoever to any report of such proceedings. The report would be qualifiedly privileged only. The proceedings themselves are absolutely privileged. Thus it was held in New York in 1854 in *Hosmer v. Loveland* (19 Barbour 111) that words spoken or published, which under ordinary circumstances would be slanderous or libelous, are absolutely privileged when spoken or written on or in connection with a lawful occasion, — that is, a legal or judicial proceeding, parliamentary debate, application, petition, com-

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munication to the executive or legislative departments, etc., — but subject to this qualification: that, where the object or occasion of the words or writing is redress for an alleged wrong before some body or individual, such body or individual must have authority to entertain the proceedings.

That is absolute privilege, as won by English judges and legislators at a comparatively early date. But qualified privilege is a different matter, acquired in a different way much later, and applicable to the fair and true reports of the proceedings absolutely privileged. Nor must it be supposed that newspaper proprietors alone are protected by qualified privilege. Publishers have no special license to publish defamatory statements, but have only the same right as the rest of the community, as cogently stated in a Massachusetts decision of 1908 in *Kimball v. Post Publishing Co.* (199 Mass. 248). Qualified privilege applies to all persons and guarantees to all the liberty to make public the proceedings of legislators and those

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participating in judicial or other public and official proceedings.

The acknowledgment of this right did not come without a fight. It was the outgrowth of long struggle between those holding two opposing views of the relation between rulers and subjects. For centuries the ruler was a superior being, by nature of his position wise and good, and the rightful arbiter of the whole people; therefore, it was manifestly wrong to reprove him openly, and even when mistaken he was told of his mistakes with due respect so that no censure might be cast upon him that intentionally or unintentionally would diminish his authority. But in time the ruler came to be agent and servant of the people, and the subject, as the wise and good master, for expediency relinquished to the ruler certain powers; therefore, every member of that public had a manifest right and duty to censure the ruler. This view came late. In England during the eighteenth century, Lord Camden was the only judge who upheld the right of the people to publish the truth

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about their rulers' acts. True democracy was impossible so long as Parliament and the court could prevent the people ascertaining the real facts concerning their proceedings.

DEVELOPMENT OF THE LIBEL LAW IN ENGLAND

THE government of the United States was devised at the very time when the long struggle in England for the right to print parliamentary debates was sweeping towards victory. The American colonies had broken loose during that wave of discontent felt by all liberally-inclined peoples chafing under the repressive parliamentary restrictions of the age. Their independence established, they took over, along with many political institutions, the common law theories of libel which had developed through centuries in England. To understand the situation which faced the Constitutional Conventions, both national and state, when they came to consider the relation of the press to the new governments in the process of formation, it is necessary to know something of those prevailing English conditions in which the colonists were so well versed.

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It was not until the times of the Tudors and Stuarts that libel was at all important. Yet the offense had been defined in very general terms in the laws of the Plantagenets. Under the Tudors the restrictions were closely drawn, and discussion deemed in any sense hostile to the government brought the disputant within one of the many statutes passed from time to time creating new treasons and felonies.

Printing had been perfected by Gutenberg, Faust and Schoeffer by 1443, and by the end of the fifteenth century newspapers were to be found in Venice, Cologne, Copenhagen, Paris and Amsterdam. Yet England did not have a newspaper until 1622 when the *Weekley Newes* was printed for Nicholas Bourne and Thomas Archer, and even this sheet was forced to confine itself to "newes from Forain Parties." Discussion of local affairs was still unheard of under the rigorous censorship laws of the Tudors and Stuarts.

Chief among the libel cases of this

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period was that of *Martin Marprelate* (1 St. Tr. 1271). In the course of the summing up the judge said: "You of the jury have not to inquire whether he is guilty of the felony, but whether he be the author of the book, for it is already set down by the judgment of all the judges in the land that whosoever was author of that book was guilty by the statute of felony." Udall, a Puritan, was found guilty of publication, and therefore of libel. Herein we see the germs of the controversies which later became of utmost importance.

In the case *de famosis libellis* of 1605 (5 Coke's Rep. 125), a distinction was drawn between libels against private persons and libels against magistrates or public persons, a distinction which denied the press the right of qualified privilege for over two centuries.

With the Restoration the freedom of the press reached its lowest ebb. Qualified privilege was still swamped under the even larger problem of complete suppression of all news. No better illustration

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of the rigor of the law is to be found than in the opinion of Lord Chief Justice Scroggs at the trial of *Henry Carr*, July, 1680 (7 St. Tr. 1111):

When by the king's command we were to give in our opinion what was to be done in point of the regulation of the press, we did all subscribe that to print or publish any newspapers or pamphlets of news whatsoever is illegal; that it is a manifest intent to the breach of the peace, and they may be proceeded against by law for an illegal thing. . . . Therefore, this book, if it be made by him to be published, it is unlawful whether it be malicious or not. . . . If you find him guilty and say what he is guilty of, we will judge whether the thing imports malice or no.

Here once more was definitely stated that nefarious proposition that publication was proof of guilt and that the court alone determined what constituted malice and libel. This decision shows how vigorously the courts were enforcing the Licensing Act then on the books — an Act growing naturally out of centuries of governmental monopoly of the press, and

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finally repudiated by the Commons in 1694 for all time.

After the Commons had refused to renew the Licensing Act, anyone might print what he would, but he was held strictly responsible to a rigorous interpretation and discipline by the courts. "A fair and true report" was in no sense privileged, and, almost a century after the renunciation of censorship, Lord Mansfield declared from the bench that "the greater the truth the greater the libel."

Authors, printers, and publishers, desirous of giving accurate accounts of the proceedings of Parliament or of any of the courts were faced with two difficulties: a Standing Order of both Houses of Parliament expressly forbid the publication of their own proceedings, while the courts frequently maintained the same restrictions; and, secondly, if the contents were libelous the very fact of publication convicted the defendant, and no evidence to prove the truth of the charges was admitted.

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The matter was brought sharply into focus by two libel prosecutions famous in the history of the Liberal Movement: the long-drawn-out fight of Wilkes with the House of Commons, and the trial of the publishers of Junius's letter to the king.

Wilkes, on the 23d of April, 1763, in No. 45 of the *North Briton*, commented upon the king's speech at the prorogation and upon the recent unpopular peace in a manner that was deemed a studied insult to the king, although he specifically attacked the minister as the author of the speech. An information was filed against Wilkes in the Court of King's Bench, and a verdict obtained against him for printing and publishing a seditious libel (19 St. Tr. 1075). The House of Commons unseated him, and the matter became a political issue.

The excitement attendant upon the injudicious persecution of Wilkes had not yet subsided when, in the *Morning Advertiser* of December 19, 1769, ap-

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peared Junius's celebrated letter to the king. As the author was unknown, informations were at once filed against printers and publishers of the letter, as propagators of inflammatory and seditious libel. Two of the cases arising out of this proved to be of utmost importance, and their decisions had great, if indirect, effect upon the question of qualified privilege.

Lord Mansfield at the trial of *Woodfall*, June 13, 1770 (20 St. Tr. 895) for the publication of the Junius letter, instructed the jury that "as for the intention, the malice, the sedition, or any other harder words which might be given in informations for libels, public or private, they were merely formal words, mere words of course, mere inferences of law, — with which the jury were not to concern themselves." The jury returned a verdict of "guilty of printing and publishing only," and the prosecution's plea for amendment was in vain. But the court held the verdict to be uncertain and ordered a new trial.

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The printer and publisher of the *Evening Post* was next tried for printing the Junius letter (*Rex v. Miller*, 20 St. Tr. 870). The jury, disregarding Lord Mansfield's instructions, boldly returned a verdict of not guilty. Other printers were tried and acquitted, and it was clear that Lord Mansfield had gone too far.

His opinions were finally entirely superseded by the Fox Libel Act (32 George III, 60). One of its most important measures referred to the rights of juries in libel cases to give their verdict upon the whole matter in issue, and provided:

that on every trial the jury sworn to try the issue may give a general verdict of guilty or not guilty upon the whole matter put in issue upon such indictment and information; and shall not be required or directed by the court . . . to find the defendant or defendants guilty merely on the proof of the publication by such defendant or defendants of the paper charged to be a libel, and of the sense ascribed to the same in such indictment or information.

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The court, however, might still give its opinions or directions to the jury upon the matters in issue. In deference to the strong popular demand for liberty of the press, the Act was interpreted as giving the jury the right to consider the intent and tendency of the defendant's words, and to exonerate the defendant for criticism of public institutions, laws and men, except when made with illegal intention.

The battle was not yet won, even though at the same time great steps were being taken in the contemporaneous agitation for qualified privilege. Prosecutions during the last three years of George III's reign were many and the attorney-general was allowed to hold the accused to bail. Gradually the rigorous enforcement wore away, although it was not until 1843 that it was provided by Lord Campbell's Act (6 & 7 Vic. 96) that in the prosecutions for libel truth could be pleaded as a defense, coupled with the plea that "it was for the public benefit that the said matter charged should be published."

PUBLICATION OF PARLIAMENTARY DEBATES

NEWSPAPERS were hampered greatly by two restrictions which parliamentary jealousy enforced: the exclusion of strangers from parliamentary discussions, and restraints upon publication of debates.

From the beginning, Parliament had exercised the right to exclude strangers from its deliberations. During the early stages this was more for reasons of convenience than for secrecy. Later, the exclusion of strangers was an aid rather than an obstacle to political freedom, since it insured a member against the likelihood of his words being specifically noted down for future condemnation before the Court of King's Bench or the Stannary Court. This danger passed with the successful termination of the conflict with the Stuarts, and the privilege of exclusion was continued as a political weapon. Let a popular member of the Opposition rise

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to speak, and at once the Government moved exclusion, so that the effect of the speech on the public was, of course, lost. Describing the inability of an opposition member to make an impression, Burke pointed out in *Present Discontents* that "in the House he votes forever in a dispirited minority; if he speaks, the doors are locked."

The prohibition of printing and publishing debates of course dates from a later period than the exclusion of strangers. The press had made great advances before these restrictions were declared, but from the time of the Commonwealth on, persons printing reports were subject to prosecution. Parliament became more rigorous in its jealous protection of its privacy after the Revolution, and passed resolutions to restrain "newes-letter writers" from "intermeddling with their debates or other proceedings," or "giving any account or minute of the debates."

Despite these strictures, the press managed to secure reports. Near the end

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of Queen Anne's reign regular but imperfect accounts of all the principal debates were published in Boyer's *Political State of Great Britain* which was begun in 1711, and also in the *London Magazine*. Dr. Johnson wrote the Parliamentary reports from November 19, 1740, to February 23, 1743, in the *Gentleman's Magazine*, from notes of Cave and his assistants. Names of the speakers were invariably omitted. Until 1738, the papers had given only the initials, and had contrived to escape Parliamentary censorship by withholding publication until the end of the session; but, in that year, the Commons prohibited all publications of debates, or proceedings "as well during the recess, as the sitting of Parliament" and warned that it would "proceed with the utmost severity against offenders" (10 Parl. Hist. 800).

From thence on the fear of parliamentary censure struck into reportorial hearts and forced devious circumlocutions in the accounts of legislative proceedings. In the *Gentleman's Magazine*, the debates

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were recorded as taking place in "the Senate of Great Lilliput," and the *London Magazine* reported the oratory of Mark Antony, Brutus, and such like worthies, in the Political Club. The Lords in 1729 ordered part of their Journal taken out and destroyed because that part had been printed in Rymer's *Foedera* (23 Lords Journ. 422).

Matters came to a head with the attempted punishment of the printers in 1771. Colonel George Onslow, always first in such matters, presented on February 8 a complaint of *The Gazetteer and New Daily Advertiser*, printed for R. Thompson, and of the *Middlesex Journal*, printed by R. Wheble, as "misrepresenting the speeches, and reflecting on several of the members of this House" (2 Cavendish Deb. 257). The printers were ordered into custody, but when the Sergeant-at-Arms tried to execute the order, he was laughed at by their servants. The House then asked the king to issue a proclamation with a reward for their apprehension. Colonel Onslow, on March

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12, made a complaint against the printers of six other newspapers (*ibid.* 377). Certain enlightened members of Parliament in vain availed themselves of amendments and motions for adjournment until past four in the morning, with no less than twenty-three divisions; but in the end all six of the printers were ordered to attend at the bar.

On the appointed day, Baldwin, Wright, Bladon and Evans appeared. Woodfall was already in the custody of the Black Rod, by order of the Lords; and Miller did not attend and was ordered into custody.

Wheble was collusively apprehended by Carpenter, a printer, and taken before Alderman Wilkes, who had not only encouraged the printers to resist but also had initiated schemes of defying Parliament. Wilkes at once discharged the prisoner, bound him over to prosecute Carpenter for false imprisonment, and wrote Lord Halifax, the Secretary of State, that Wheble had been apprehended by a person who "was neither a constable nor

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peace-officer of the city," and for no legal offense, but merely in consequence of the proclamation, "in direct violation of the rights of an Englishman, and of the chartered privileges of a citizen of this metropolis."

This was practically repeated in the case of Thompson, and the Lord Mayor was sent to the Tower for resisting the orders of the House of Commons.

Although Parliament in the end won a technical victory, it no longer prosecuted for the publication of its debates, for another contest with the printers was manifestly impossible because of the powerful support from Opposition and populace. From this time on the proceedings of both Houses were freely reported.

Yet the reporters were still beset with so many difficulties that a fair and true report was not always a possibility. Accuracy suffered because the reporters were prohibited to take notes and had, therefore, to rely on their memories. Such notes as were taken were written surreptitiously and in fear of expulsion by the

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Sergeant-at-Arms. Strangers' accommodations were so limited that the reporters, lacking their own gallery, had to wait on the stairs for hours before the doors were open in order to secure admission. Consequently, the reports were inaccurate and faulty. No matter how diligently the reporter strove to retain the substance of the debate, the actual language always eluded him; and no doubt Dr. Johnson was correct when he told a company admiring one of Pitt's most eloquent speeches, "That speech *I* wrote in a garret, in Exeter Street." Johnson was one of the best of the reporters of his time, and although Sir John Hawkins regarded his reports as flights of imagination, the editor of Cobbett's *Parliamentary History* testifies to their general accuracy.

The struggle of 1771, no matter what freedom it may have won for the publishers and printers, afforded the reporters no further facilities. Lord Malmesbury, speaking of Pitt's speech, May 23, 1803, on the renewal of hostilities with France,

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wrote in his *Diary*, IV, 262: "By a new arrangement of the Speaker's, strangers were excluded till so late an hour, that the newspaper printers could not get in, and of course, no part of Pitt's speech can be printed." Even as late as 1807 complaint was made that a person was taking notes in the gallery of the House of Lords.¹

Still more difficulties arose from the frequent and capricious exclusion of strangers on the request of a single member. Colonel Luttrell, on January 29, 1778, seven years after the contest with the printers, complained of misrepresentation in a newspaper and said he would move the exclusion of strangers to prevent a recurrence. To this Fox made reply: "I am convinced the true and only method of preventing misrepresentation in a newspaper is by throwing open the gallery, and making the debates and decisions of the House as public as possible. There is less danger of misrepresentation in a full company than a thin one, as there

¹ "Courts and Cabinets of George III and IV," 150.

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will be a greater number of persons to give evidence against the misrepresentation." (19 Parl. Hist. 647.)

The debate on Sheridan's motion for a committee on the state of Ireland was lost June 14, 1798, by exclusion of strangers (33 *ibid.* 1487). In 1810, Yorke enforced this privilege, and Sheridan vainly tried to modify the rule which vested in a single member the power of excluding the public (15 Hansard's Deb. 325). And even so late as 1894 the doors of the House of Commons were closed against strangers for nearly two hours, and no debates during that time were reported.

Despite these trying impediments, the reports became more systematic with the relaxation from fear of punishment and soon improved in character and copiousness. Chief among those who developed the system of reporting of debates to a state of rapidity and completeness were Almon, Woodfall and Perry.

Little by little the old inconveniences and restrictions were overcome. The fire which destroyed both Houses of Parlia-

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ment in 1834 introduced a new era in reporting. For years the reporters had been allowed privileges which their predecessors would have considered princely, but they were still required to do all of their work in the strangers' gallery. In the temporary houses, separate galleries were introduced for the reporters; and this change was carried over into the present buildings. This one fact alone would explain many of the advances of the last century.

There was still another right which the printers asked in order that they might give a fair and true report. They could inform their readers of the action of the members who took part in the debates, but the stand of the great silent majority was still a secret. They could not tell who were present, how they voted, what members composed the majority. Therefore, they now shifted their demands from the right to report legislative proceedings to the right to give the names of the minority and majority.

It is true that before this, on questions of unusual interest, the minority had se-

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cured the publication of their names, but very rarely had a list of the majority also been obtained. In fact, the Commons, in 1696, declared the printing of the names of the minority to be a breach of absolute privilege, as "destructive of the freedom and liberties of Parliament" (2 Com. Journ. 572). The Opposition, in 1782, published division lists with the ministerial members appearing in red letters, and the minority in black (2 Wraxall's Memoirs 591). But in all such cases the publication had come about through the initiative of individual members; for the House itself took no cognizance of names, concerning itself only with numbers.

Gradually more and more publicity was given legislative acts. Even after strangers were allowed to attend debates, no doubt was raised as to the necessity of excluding them during a division. In 1849 a committee reported that their exclusion was necessary. However, since 1853 there has been no attempt to prevent their presence. Yet it was not until 1845 that the presence of strangers in the gal-

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leries and other parts of the House not set apart for members was recognized by the orders of the House of Commons. Nor did this tardy assent supersede the ancient rule which excluded them at the whim of a single member, as witness the case in 1894 already cited.

In all of these reforms the House of Lords lagged behind the Commons. Only since 1857 have daily division lists been published by the Lords and before that year no strangers remained in the galleries or in the space within the rails of the throne during voting.

Another important measure for publicity was enacted in 1839 when the name of every member addressing questions to witnesses before select committees of the Commons was ordered published with the minutes of the evidence. Their presence at each meeting and their votes upon every question were also recorded and published in the minutes. The House of Lords adopted the same rule in 1852.

Likewise, the increasing activity of the legislature has resulted in the collection

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of information from all sources. In 1835 the Commons ordered such documents to be published and sold to the public at a small price; and in 1840 qualified privilege was extended by statute to protect those engaged in printing such documents and those making fair and true abstracts or extracts from them (3 & 4 Vic. 9).

Little by little, then, the right of the newspaper to free access to the proceedings of the legislature has been won or granted. But, after all, that was only half of the immunity of qualified privilege and the papers had to carry the fight into the courts. Long after it was recognized that a reporter could not be restrained for publishing a report of the debates and proceedings of Parliament, there was great doubt as to the exact status of such reports in a libel suit. This doubt arose from the anomaly of the Parliamentary situation; for while reporters were given free access to these debates there still remained that obsolete Standing Order of both Houses prohibiting such publication, and it was argued that no privilege could attach to

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any report published in contravention of such Standing Orders, since such report in itself was in contempt of the House.

This question was legally settled by the important case of *Wason v. Walter* (4 L. R. Q. B. 73; 17 W. R. 169; 19 L. T. 409) in 1868, a case which has rarely received the attention it deserves at the hands of libel historians. Wason had induced Earl Russell to present to the House of Lords a petition charging the newly appointed Lord Chief Baron with having suppressed evidence before an election committee some thirty years before. On this charge Wason asked that the Lords remove the judge from office. In the ensuing debate the charge was shown to be wholly unfounded and the conduct of Wason in presenting such a petition was severely commented on by the Earl of Derby and others. The *London Times*, of which Walter was then proprietor, printed an admittedly correct report of the debate, and Wason brought suit against Walter. Chief Justice Sir Alexander Cockburn directed the jury

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that if they were satisfied that the report was faithful and correct, it was in point of law a privileged communication; and later the court of Queen's Bench discharged a rule *nisi* which had been obtained for a new trial on the ground of misdirection.

Since there were no precedents or customs to which the court could appeal in declaring the law to be contrary to the Standing Orders forbidding publication, the decision of Chief Justice Cockburn takes unto itself the dignity of a new ruling and the valor of a pioneer step in the legal defense of qualified privilege. For that reason, that part of it which most significantly indicates the importance of this decision in blessing qualified privilege with the sanctity of the law is herewith quoted:

Whatever disadvantages attach to a system of unwritten law, and of these we are fully sensible, it has at least this advantage, that its elasticity enables those who administer it to adapt it to the varying conditions of society, and to the requirements and habits of the age in which we live, so as to avoid the

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inconsistencies and injustices which arise when the law is no longer in harmony with the wants and usages and interests of the generation to which it is immediately applied. Our law of libel has, in many respects, only gradually developed itself into anything like a satisfactory and settled form. The full liberty of public writers to comment on the conduct and motives of public men has only in very recent times been recognized. Comments on government, on ministers and officers of State, on members of both Houses of Parliament, on judges and other public functionaries, are now made every day, which half a century ago would have been the subject of actions or *ex officio* informations and could have brought down fine and imprisonment on publishers and authors. Yet who can doubt that the public are gainers by the change?

With this decision our inquiry into the history of qualified privilege can be brought to a close, as far as English law is concerned. The early history formed a heritage which the American Colonies carried over with them, and the later conflicts and decisions often had discernible influence upon our own development, although it is to be noted that in many cases

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England lagged behind America in the matter of qualified privilege.

By the end of the Nineteenth Century, however, England was more liberal in her libel laws than were the other European countries. Comparison of the English, German and French laws reveals the fact that the law of France was by far the most severe, although Germany was more severe than England. The striking characteristic of the English law is its historical nature. In our brief and hurried sketch we have traced the main outlines of its development from 1275 to 1895 — a period of over six hundred years — and during that time its process, as we shall later see, was comparatively unaided by legislation, and such assistance as was given by Parliament is to be explained by studying the common law and the decisions upon it. The old English statute law has been almost obsolete so far as press offenses are concerned for a period of about fifty years.

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AT the time when the American Colonies were stirring to revolt, the struggle in England was at its height. This, in all its bitterness, was inherited by the Colonies, though the more liberal attitude of the colonists on such problems presaged an ultimate victory for qualified privilege.¹ In this, however, we must be only relative — for the victory did not come without a conflict, and in some respects it is still incomplete. This struggle must be briefly outlined before we can understand the present status of the libel laws as they apply to qualified privilege.

During the colonial period and for several decades after the Revolution, there was a conflict of ideas in the United States arising from two antagonistic theories of the freedom of the press in presenting fair and true reports.

¹ Duniway, "Freedom of Speech in Massachusetts," 89 note.

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The first of these was derived from Blackstone and was the older and better established of the two. It is in a large measure comparable to the attitude of Lord Mansfield, previously explained, on the English law of the period. It can best be set forth in Blackstone's own words, as found in section 168 of Book IV:

The liberty of the press is indeed essential to the nature of a free state; but this consists in laying no *previous* restraints upon publications, and not in freedom from censure for criminal matter when published. Every freeman has an undoubted right to lay what sentiments he pleases before the public: to forbid this, is to destroy the freedom of the press; but if he publishes what is improper, mischievous, or illegal, he must take the consequences of his own temerity. To subject the press to the restrictive power of a licenser, as was formerly done, both before and since the Revolution, is to subject all freedom of sentiment to the prejudices of one man, and make him the arbitrary and infallible judge of all controverted points in learning, religion, and government. But to punish (as the law does at present) any dangerous or offensive writing which, when published, shall on a fair and impartial trial be

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adjudged of a pernicious tendency, is necessary for the preservation of peace and good order, of government and religion,—the only solid foundations of civil liberty. Thus the will of individuals is still left free; the abuse only of that free-will is the object of legal punishment. Neither is any restraint hereby laid upon freedom of thought or of inquiry: liberty of private sentiment is still left; the disseminating, or making public, of bad sentiments, destructive of the ends of society, is the crime which society corrects. A man (says a fine writer on this subject) may be allowed to keep poisons in his closet, but not publicly to vend them as cordials. And to this we may add that the only plausible argument heretofore used for restraining the just freedom of the press, “that it was necessary to prevent the daily abuse of it,” will entirely lose its force, when it is shown (by a seasonable exertion of the laws) that the press cannot be abused to any bad purpose without incurring a suitable punishment: whereas it never can be used to any good one, when under the control of an inspector. So true it will be found, that to censure the licentious, is to maintain the liberty of the press.

Notwithstanding this eulogy, it is evident that consistently enforced penalties upon

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those who criticize the government can be as effective a censorship as that of the Licensing Act.

The second theory goes further than Blackstone was willing to go, and not only concedes the right of the press to be free of restrictions before publication, in the form of censorship, but demands that the press be freed from restraints after publication except where such publications regarding official proceedings or acts are malicious, blasphemous, obscene, or otherwise harmful to morals. This theory would draw a distinction between "liberty" and "license"—a distinction extremely difficult to determine in many instances.

In the beginning, the Blackstonian theory was prevalent; but in time there crept into judicial decisions a more liberal attitude, until, at present, the second interpretation is the dominant one. Nevertheless, the conflict, though latent, still crops out now and then in the decisions of our Federal Courts. Chief Justice White gives a strict definition of this second interpretation—protection

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for the use of utterance but not for the abuse—in his opinion in the *Toledo Newspaper Case* (247 U. S. 402) in 1918 in which he rejects:

the contention that the freedom of the press is the freedom to do wrong with impunity and implies the right to frustrate and defeat the discharge of those governmental duties upon the performance of which the freedom of all, including that of the press, depends. . . . However complete is the right of the press to state public things and discuss them, that right, as every other right, enjoyed in human society, is subject to the restraints which separate right from wrong-doing.

A variant of this can be found in Cooley's *Constitutional Limitations*. The freedom of speech, he says, was guaranteed in our Constitution to guard against repressive measures by the several departments of government, but not against utterances which are a public offense, or which injure the reputation of individuals.

We understand liberty of speech and of the press to imply not only liberty to publish

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but complete immunity from legal censure and punishment for the publication, so long as it is not harmful in its character, when tested by such standards as the law affords.

The germs of the controversy are to be found in the pre-Revolutionary agitation which resulted in two noteworthy libel cases: one against John Franklin and the other against John Peter Zenger. Franklin's trial and imprisonment need be mentioned here only as an indication of the temper of the times. Franklin had satirized and criticized the General Court and the Governor and was sentenced therefor to a month's imprisonment, during which time his younger brother, Ben, was allowed to run the paper.

More significant is the celebrated trial of *Zenger* (17 Howard's St. Tr. 675) which decided for the colonies two problems then agitating England—the right of the press to record and discuss the acts of the government, and the right of juries to decide the intent rather than the mere fact of publication. The trial attracted wide-spread interest both here

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and in England. Thirteen editions of the report of the trial were published in London and in this country before 1791—the year when the first amendment was adopted, and only a few months prior to the Fox Libel Act in England. Gouverneur Morris characterized it as the “dawn of that liberty which afterwards revolutionized America.”

John Peter Zenger started the *New York Weekly Journal*, November 5, 1733, in opposition to Governor William Cosby. For having repeatedly printed criticisms of public officials, Zenger was arrested on the charge of libel on Sunday, November 17, 1734, and was imprisoned for nearly nine months before he could obtain trial. But he continued to publish the *Journal* by a process which he himself describes: “I have had since that Time, the Liberty of Speaking through the Hole of the Door, to my Wife and Servant by which I doubt not you’ll think me sufficiently excused for not sending my last week’s Journall, and I hope for the future by the Liberty of

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Speaking to my Servants through the Hole of the Door of the Prison, to entertain you with my weekly Journall as formerly."

On a legal technicality, Zenger's counsel was "thrown over the bar" by the judge, who had been named by Cosby alone; but the editor's friends quietly engaged Andrew Hamilton, celebrated Philadelphia jurist and personal friend of Franklin, to uphold the rights of the press. In the course of the trial Hamilton offered to prove the truth of the statements in the alleged libel, but was overruled. He vehemently attacked the court's attitude in his plea to the jury:

And as we are denied the liberty of giving evidence to prove the truth of what we have published, I will beg leave to lay it down as a standing rule in such cases, that the suppressing of evidence ought always to be taken for the strongest evidence, and I hope it will have weight with you.

Hamilton then bombarded the Attorney-General with questions which are still matter of dispute in our courts:

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Ay, Mr. Attorney, but what certain standard rule have the books laid down by which we can certainly know whether the words or the signs are malicious? Whether they are defamatory? Whether they tend to a breach of the peace, and are a sufficient ground to provoke a man, his family or friends to acts of revenge, especially those of the ironical sort of words? And what rule have you to know when I write ironically? I think it would be hard when I say such a man is a very worthy, honest gentleman, and of fine understanding, that therefore I meant he was a knave or a fool.

There followed a discussion of the right of the jury or the judge to define the libelous character of the publication. The court declared that "the jury could find that Zenger printed and published those papers, and leave it to the court to judge whether they were libelous." Hamilton answered:

I know, may it please your Honor, the jury may do so; but I likewise know they may do otherwise. I know they have the right, beyond all dispute, to determine both the law and the fact, and where they do not doubt the law they ought to do so. This

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manner of leaving it to the judgment of the court whether the words are libellous or not, in effect renders juries useless, to say no worse, in many cases: but this I shall have occasion to speak of by-and-by.

This was advanced doctrine in those days when the Colonial court was firm in its stand to retain the final word; but Hamilton vindicated it with a sound interpretation of the libel laws, and went on to lay down the fundamental right of the people to know what their governors and legislators were doing:

I will go further, it is a right which all freemen claim, and are entitled to, to complain when they are hurt; they have a right publicly to remonstrate against abuses of power or open violence of men in authority, and to assert with courage the sense they have of the blessings of liberty, the value they put upon it, and their resolution at all hazards to preserve it as one of the greatest blessings Heaven can bestow.

In his peroration Hamilton eloquently exhorted the jury to disregard the instructions of the court, so manifestly partial to the Governor.

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It is the best cause; it is the cause of liberty; and I make no doubt but your upright conduct, this day, will not entitle you alone to the love and esteem of your fellow citizens, but every man who prefers freedom to a life of slavery, will bless and honor you as men who have baffled the attempts of tyranny; and by an impartial and uncorrupt verdict, have laid a noble foundation for securing to ourselves, our posterity, and our neighbors, that to which nature and the laws of our country have given us a right—the liberty—both of exposing and opposing arbitrary power in those parts of the world at least, by speaking and writing truth.

This plea, and the favorable verdict that it won, placed the Colonies decades ahead of the Mother Country in the right of the press to chronicle and comment upon official acts. Hamilton's reasoning is comparable to that of Erskine, in 1792, in the great libel suit in London against Thomas Paine for the publication of the "Rights of Man." The Zenger case with its popular verdict set the trend of thought in America and resulted in the liberal attitude found at

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the time of the Revolution, an attitude which granted to a struggling press privileges which English newspapers were still denied.

This attitude was clearly indicated in an address to the inhabitants of Quebec issued by the Continental Congress on October 26, 1774, which declared that the English colonists had five invaluable rights: representative government, trial by jury, liberty of the person, easy tenure of land, and freedom of the press.¹

The last right we shall mention regards the freedom of the press. The importance of this consists, besides the advancement of truth, science, morality and arts in general, in its diffusion of liberal sentiment on the administration of government, its ready communication of thoughts between subjects, and its consequential promotion of union among them, whereby oppressive officials are shamed or intimidated into more honorable and just modes of conducting affairs.

Here, certainly, is an admirable exposition of the use of qualified privilege as a

¹ Journal of the Continental Congress I, 57 (Edition of 1800).

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protection against the arbitrary abuse of absolute privilege, a safeguard of which we shall speak in full later; — and here certainly is a clear indication of the prevailing sentiment at the time of the Revolution. Why then — it is often asked — did not the Constitutional Convention provide for the liberty of the press?

The answer to this is evident enough. By some, freedom of the press was regarded as already an accepted and incontrovertible right, and by others it was subordinated to another conflict — that between expressed and delegated powers. All opposition to proposals ensuring freedom of the press was grounded on the belief that specific provisions were not required. Charles Pinckney introduced a clause to the effect that the liberty of the press should be inviolably preserved (or observed); but Sherman answered: "It is unnecessary . . . the power of Congress does not extend to the press." The proposition was lost. Later, Pinckney himself, in answering an objection raised during the discussion

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of the proposed Constitution in the South Carolina House of Representatives, said:

With regard to the liberty of the press, the discussion of that matter was not forgotten by the members of the convention. It was fully debated, and the impropriety of saying anything about it in the Constitution clearly evinced. The general government has no powers but what are expressly granted to it; it therefore has no power to take away the liberty of the press. That invaluable blessing, which deserves all the encomiums the gentleman has justly bestowed upon it, is secured by all our state constitutions; and to have mentioned it in our general Constitution would perhaps furnish an argument, hereafter, that the general government had a right to exercise powers not expressly delegated to it.¹

Hamilton expressed the same view, in *The Federalist*, No. 84:

For why declare that things shall not be done, which there is no power to do? Why, for instance, should it be said, that the liberty of the press shall not be restrained, when no

¹ Farrand, "Records of the Federal Convention," III, 256.

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power is given by which restriction can be imposed?

Such reasoning prevailed in the Convention, and the Constitution contained no guarantee of freedom of speech or press, except the immunity granted Congressmen for anything said in debates; but at once there was a popular outcry. Freedom of the press was demanded by several of the states. Virginia, New York and Rhode Island embodied a declaration of this right in their ratifications of the Federal Constitution, and Virginia expressly demanded an amendment also. Most significant, however, was the demand of Maryland, which in the convention of 1788 drew up a clause for the proposed Federal Bill of Rights, declaring: "In prosecutions in the federal courts, for libels, the constitutional preservation of this great and fundamental right may prove invaluable." Here, of course, is an argument absolutely inconsistent with any Blackstonian limitation of the right of freedom to the mere absence of censorship.

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In consequence of this wide-spread demand, the first Ten Amendments were appended to the Constitution as a Bill of Rights, in a form which made it far more effective than the similar documents of the European governments; for the Bill of Rights in a European constitution is a declaration of policies and nothing more, since the courts cannot disregard the legislature's will even though its acts violate the spirit of the constitution. On the other hand the American Bill of Rights performs the two-fold function: it fixes a definite limitation on the government's powers of action; and, long before the definite limitation is reached, it forces upon every official of the three branches of government a constant regard for certain declared principles of American life. The First Amendment reads as follows:

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech or of the press; or the right of the people peaceably to assemble, and to

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petition the government for a redress of grievances.

This date, 1791, marks for America the legal recognition of the freedom of the press, although the practical problems of defining the limits of that phrase were far from solved. The First Amendment met with varying interpretations during the long fight over the Alien and Sedition Laws of 1798 (3 Annals 5th Congress 2990), which provided for punishment of false, scandalous and malicious writings against the government, either House of Congress, or the President, if they were published with intent to defame or to excite or stir up sedition or aid any hostile designs of foreign nations. If the publication was made with good intent, the truth of the charges could be proved and the jury might determine the criminality of the offense.

REPORTING LEGISLATIVE PRO- CEEDINGS IN AMERICA

LEGISLATION, in the early days of American history, was not openly carried on. Reporters were not allowed in the Constitutional Convention, and its deliberations were not made public until near the end of its work. Opponents of qualified privilege have here a fine opportunity to trace the benefits of secret legislation by comparing the orderly, thoughtful and productive labors of the Constitutional Convention with the turmoil and hysteria of the French Assembly meeting without the least restrictions on publicity. Although this particular comparison is not at all conclusive — because of the thousand and one collateral considerations to be accounted for — yet it does open up a problem still unsolved: how far is public opinion helpful and how far harmful in the administration of public affairs?

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This is too large a question to enter into here, except to point out that an effort is being made to open diplomatic proceedings — such as treaty conferences, and interchange of notes — to the public through the medium of the press. But as yet the majority of these diplomatic affairs, and a large number of the executive functions, are carried on in secret, with very little popular demand for publicity. Nor is there much agitation upon the part of the newspaper to extend qualified privilege past the boundaries of the New York Statute.

In legislative and judicial fields, however, the bounds of qualified privilege have gradually been pushed to the utmost limit. At first, the presence of reporters in Congress was either forbidden or allowed without official recognition. Thus, on Friday, January 15, 1790, we find a long debate in the House of Representatives on the subject (1 Abridg. Debates of Congress 180). It appears that during the previous session reporters had been allowed to sit on the floor of the

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House, but that at the beginning of this session they had been given to understand that they were not welcome, and had withdrawn to the balcony, and that even there they had been excluded, along with other strangers, for two days. In the course of the discussion various members emphasized the good results of printing debates, although they decried the many errors; but one after another asked that the reporters be allowed to return without the House committing itself one way or the other. White wished "the business to go on without expressed sanction"; and Boudinet thought "the Speaker might admit short-hand writers without giving to their publications any degree of legislative authority."

The Senate, less lenient, at first held its sessions behind closed doors. Foremost in the fight for qualified privilege and the right to report debates was Freneau, editor of *The National Gazette*, party organ of Jefferson. In February, 1792, Freneau attacked the Senate's policy bitterly:

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A motion for opening the doors of the Senate chamber has again been lost by a considerable majority—in defiance of instruction, in defiance of your opinion, in defiance of every principle which gives security to free men. What means this conduct? Which expression does it carry strongest with it, contempt for you or tyranny? Are you freemen who ought to know the individual conduct of your legislators, or are you an inferior order of beings incapable of comprehending the sublimity of senatorial functions, and unworthy to be entrusted with their opinions? How are you to know the just from the unjust steward when they are covered with the mantle of concealment? Can there be any question of legislative import which freemen should not be acquainted with? What are you to expect when stewards of your household refuse to give account of their stewardship? Secrecy is necessary to design a masque to treachery; honesty shrinks not from the public eye.

The Peers of America disdain to be seen by vulgar eyes, the music of their voices is harmony only for themselves and must not vibrate in the ravished ear of an ungrateful and unworthy multitude. Is there any congeniality excepting in the administration, between the government of Great Britain and

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the government of the United States? The Senate supposes there is, and usurps the secret privileges of the House of Lords. Remember, my fellow citizens, that you are still freemen; let it be impressed upon your minds that you depend not upon your representatives but that they depend upon you, and let this truth be ever present to you, that secrecy in your representatives is a worm which will prey and fatten upon the vitals of your liberty.

The Senate could not long withstand the attack led by Freneau, and Washington correspondents were admitted. But absolute freedom was not given to all alike, so that we find the Senate in 1841 attempting to exclude reporters of the Washington newspapers. Here, however, it should be pointed out, the attempted exclusion was more for the purpose of favoring party organs of the Capital than of denying the right of reporting debates. By printing the reports of Congress these party papers had been making enormous sums. Henry Clay declared that \$420,000 was paid for this reason to the three Washington organs.

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James Gordon Bennett, of the *New York Herald*, promptly attacked this favoritism by announcing that he was willing to give daily reports of the Senate without pay. Out of his efforts grew freedom for all newspaper correspondents at Washington.

During this same period the courts came to recognize the status of qualified privilege in reporting legislative proceedings. But as late as 1814 a Federal Court, in *Romagne v. Duane et al.*, publisher of *The Aurora* (3 Wash. Circuit Court Rep. 246), held that, although the defendant in a libel suit might plead in mitigation of damages that the alleged libel was copied from the journals of Congress, still such would not constitute a defense of the action as privileged. There were instances of a similar tendency on the part of the State courts in many cases down to and even after 1850.

Notwithstanding this belated recognition of qualified privilege, it is safe to say that during the third decade in the life of the new republic the freedom of the press

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was well on the way to establishment, and by mid-century was recognized throughout the United States. One of the most important victories for qualified privilege was the enactment in 1854 of the New York code providing that an action would not lie for “*a fair and true report of any judicial, legislative, or other public official proceedings of any statement, speech, argument, or debate in the course of the same, except upon actual proof of malice in making such report.*” This was indeed an auspicious gain for the press, and from this time on, the uncertainty which had dogged so many newspapers was greatly cleared away. This act, however, was not without its own peculiar uncertainties. One was the question of malice — to be discussed at considerable length later — and the other was the definition of what constituted public and official proceedings. Around this latter point were fought many interesting legal battles.

JUDICIAL INTERPRETATION OF THE LIBEL LAWS

THE first of these was that of *Sanford v. Bennett* (24 N. Y. 20). *The New York Herald* had printed an admittedly fair and true report of a statement of a condemned man upon the scaffold in which he had accused his attorney of misconducting his trial. The attorney in question, Sanford, brought suit against the owner of the *Herald*. It was held that the hanging of a man by the sheriff of Greene County in the execution of the sentence of death pronounced by a court of competent jurisdiction, and what was said and done while the doomed man was being brought from life to death, was not a "necessary" part of public and official proceedings, nor a judicial proceeding. The publication of a slander uttered by a murderer at the time of his execution was, therefore, not privileged either under the recently enacted statute or at the com-

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mon law; and furthermore the statute related only to statements made in judicial, legislative or administrative bodies in execution of some public duty, and therefore did not apply to an executive act to be performed by a single official, nor to acts of the minister of religion, nor of bystanders.

This decision was a severe setback to qualified privilege, and for some time was hailed as precedent for a strict interpretation of public and official proceedings.

Here the matter stood until the important decision of the New York Court of Appeals in October, 1913. In *Sedley E. Lee v. Brooklyn Union Publishing Company* (209 N. Y. Rep. 245) the opinion of the Court, written by Judge (afterward Governor) Miller, held that when a proceeding in a court was one which the public had the right to hear, and which the defendant had the right in the public interest to report, a full, fair and impartial report thereof was privileged and it was unimportant how the jurisdiction was in-

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voked or exercised, or whether the magistrate in fact had jurisdiction of the person of the accused.

The case had arisen over a report printed by *The Brooklyn Union* of proceedings in one of the Magistrate's Courts in the Borough of Brooklyn. The portion of the article complained of as libelous was as follows:

Lawyer Perry didn't confine his comments to the case in hand, that of the pastor's sudden draft on the church's available funds, but told of a recent prayer meeting in a little church, which is situated in Erasmus street, during which he broadly hinted that the pastor got away with the collection.

The lawyer said the colored flock had gathered for an evening of prayer and praise, and had donated generously when the collection plate had been passed. The plate was placed on the table on the pulpit, he said, when the Rev. Sedley Lee announced to the brethren and sisters assembled, 'Let us pray.' The money was all there before the pastor knelt at the table and crossed his hands in an attitude of devotion over the plate, but it was gone when the prayer had been concluded, the lawyer said.

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This proceeding, as reported, was instituted by a magistrate's summons, but no sworn complaint or information had been filed and no warrant had been issued. When the case was called the attorney for each side stated his case and the magistrate dismissed the proceeding without taking testimony.

In the action against the *Brooklyn Union* the plaintiff contended that the report published was not privileged because the hearing before the magistrate was not a "judicial proceeding." But the court found for the defendant. Judge Miller's opinion, in part, is as follows:

Does this case, then, fall within the reason for the rule? The proceeding was in open court where any citizen had the right to be. The magistrate assumed to act as such. The inquiry related to a matter of which he had jurisdiction. Under those circumstances we consider it unimportant to the question in hand how his jurisdiction was invoked or exercised, or whether he in fact had jurisdiction of the person of the accused. The reporter could not be expected to know whether all of the requirements of law had been com-

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plied with, or whether everything said in the course of the proceeding was strictly relevant to the subject of the inquiry. He was required, if he made any report at all, to make it full, fair and impartial, but he was not bound, nor was the defendant bound at its peril, to determine doubtful questions of law. The point is that the proceeding was one which the public had the right to hear and the defendant had the right in the public interest to report.

The importance of this decision cannot be overstressed. Before this, newspapers in making reports of what took place in a court room, of what was said by judge, or counsel or witness, took the risk of establishing the fact that the court had jurisdiction and that such transactions were a material or "necessary" part of those judicial proceedings or of losing their defense of qualified privilege. The New York Court of Appeals, by this bold decision, made plain the right of a newspaper, or of an individual, to publish, under the protection of qualified privilege, any occurrences in a judicial tribunal in which the judge there presiding actu-

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ally participated in an official capacity. Qualified privilege had gained one of its greatest victories since its first recognition in England.

This decision has its counterpart in an English case which deserves mention here because of the extremely important nature of the whole question. Lord Esher, M. R., handed down in the case of *MacDougall v. Knight & Son* (17 Q. B. D. 638) the opinion that whenever a court is engaged in the adjudication of the legal rights of the parties before it, the proceeding is in its nature judicial, and the public is entitled to be present, so long as there is room in the building, unless an order has been properly made for their exclusion, since it is an advantage to the public that fair and accurate reports should be published which place those who were not present in Court in the same position as those who were.

In America the matter was further extended by an Idaho decision in 1919 in the case of *Dayton v. Dreuheller* (182 P. 102) that libelous words used in a judi-

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cial proceeding but not pertinent and having no legal relation thereto, in the absence of a malicious intent to defame, are protected by qualified privilege.

Another victory was to follow in the decision in the suit brought by Mayor Thompson of Chicago against the Tribune Company (*City of Chicago v. The Tribune Co.* 307 Ill. Rep. 595) for charging that under his administration the city was reduced to virtual bankruptcy. The court held that such a libel action would not lie on the part of a government or of a branch of government, and sustained in effect the contention made by the counsel for the newspaper that the only instances in which a government may place restrictions on speech or writing are the following:

1. When such speech persuades others to violate the law.
2. When such speech persuades others to overthrow the government by unlawful means.
3. When such speech is obscene, immoral or blasphemous.

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4. When such speech is defamatory of individuals, under the ordinary rule of civil and criminal law.
5. When such speech is contempt, conspiracy or in violation of contract; and in certain other instances not there involved.

The decision in this most recent of important libel cases is worthy of noting. The case had attracted much attention because of the bitter war *The Chicago Tribune* and *The Daily News* had waged against the régime of Mayor Thompson. The mayor brought suit in the name of the city alleging that the *Tribune* had wrecked the financial prestige and good name of the city because it had charged that the city was "broke"; that it "owes millions of 1921 funds"; that "bankruptcy is just around the corner from the City of Chicago"; that its "credit is shot to pieces"; that "the city is headed for bankruptcy unless it makes immediate retrenchments"; that "the city's financial affairs are in a serious way"; that "it is the issue between this Tammany govern-

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ment which has bankrupted the treasury of the City of Chicago, which is in default to the city's creditors," etc.

The Supreme Court of Illinois sustained on appeal the decision of the Circuit Court and, in its opinion, written by Chief Justice Thompson, say:

The fundamental right of freedom of speech is involved in this litigation, and not merely the right of liberty of the press. If this action can be maintained against a newspaper, it can be maintained against every private citizen who ventures to criticise the ministers who are temporarily conducting the affairs of his government. Where any person by speech or writing seeks to persuade others to violate existing law or to overthrow by force or other unlawful means the existing government, he may be punished, but all other utterances of publications against the government must be considered absolutely privileged. . . .

It follows, therefore, that every citizen has a right to criticise an inefficient or corrupt government without fear of civil as well as criminal prosecution. This absolute privilege is founded on the principle that it is advantageous for the public interest that the citizen should not be in any way fettered in his

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statements, and where the public service or due administration of justice is involved, he shall have the right to speak his mind freely.

Thus, three important decisions within little more than a decade have given judicial sanction to a wider interpretation of the freedom of the press and have marked a significant advance towards the ultimate removal of the restrictions which court and legislature still enforce. This progress is starting again after the backward steps of the war period when the Espionage Act and the Censorship showed that liberty was not inalienable but only granted from above as the government's interest dictated.

Such has been, in outline, the history of this development, especially that of qualified privilege — centuries of growth, conflict, and strife, carried down through the political turmoil of England and widened under the liberalizing policies of the United States. The status of qualified privilege in America has been complicated by the conflicting jurisdictions of state and federal government. Mani-

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festly, it is impractical to give here more than the briefest of summaries of the Constitutional provisions of the states on the subject of freedom of speech, printing, rights of juries, and truth as justification.

All but five of the states have a clause resembling the New York section:

Every citizen may freely speak, write, and publish his sentiments, on all subjects, being responsible for the abuse of that right; and no law shall be passed, to restrain, or abridge the liberty of speech, or of the press.

And these five have a short clause similar to the First Amendment of the Federal Constitution. Twenty-four states¹ have a general declaration of the freedom to speak and publish. "Responsibility" is found in the Constitutional provisions of thirty-six states.² Pennsylvania was

¹ Ala. I 4; Ark. II 6; Colo. II 10; Del. I 5; Ga. I Sec. I 15; Ind. I 9; Iowa I 7; Kan. B.R. 11; Ken. 8; La. 3; Md. D.R. 40; Mass. P.I. I 16; Minn. I 3; Miss. III 13; N.C. I 20; N.H. I 22; Ore. I 8; Pa. I.R.; R.I. I 20; Tenn. I 19; Tex. I 8; Utah I 1; Va. I 12; Vt. I 13.

² "Every person may speak on all subjects being

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the first to make express exception of "abuse," but others soon followed suit. Twenty-four state Constitutions³ have expressed restrictions on legislation jeopardizing free speech.

Similarly the battle for the admission of evidence of truth of the charges made in the alleged libel has won constitutional recognition in twenty-seven states. In nineteen⁴ of these there is no ex-

responsible for abuse of that liberty": Ala. 14; Colo. II 10; Ga. I Sec. I 15; Iowa I 7; La. 3; Tex. I 8.

Some insert "freely" before "speak": Ariz. II 6; Fla. D.R. 13; Ida. I 9; Ill. II 4; Kan. B.R. 11; Ky. 8; Me. I 4; Mich. II 4; Minn. I 3; Mo. II 14; Mont. III 10; Nebr. I 5; N.J. I 5; N.M. II 17; N.D. I 9; Okla. II 22; S.D. VI 5; Wash. I 5; Wis. I 3; Wyo. I 20.

"Every citizen may freely speak on all subjects, being responsible for abuse of that right": Cal. I 9; Conn. I 5; Nev. I 9; N.Y. I 8; Ohio I 11; Pa. I 7; Tenn. I 19; Va. I 12.

"Citizens of state ought to be allowed to speak on all subjects, being responsible for abuse of that right": Md. D.R. 40.

³ Ala. I 4; Cal. I 9; Colo. II 10; Conn. I 6; Fla. D.R. 13; Ga. I Sec. I 15; Iowa I 7; Ind. I 9; La. 3; Mich. II 4; Mo. II 4; Mont. III 10; Nev. I 9; N.J. I 5; N.M. II 17; N.Y. I 8; Ohio I 11; Okla. II 22; Ore. I 8; Tex. I 8; Utah I 15; Wis. I 35; S.C. I 4; W. Va. III 7.

⁴ Ala. I 12; Colo. II 10; Conn. I 7; Fla. D.R. 13;

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pressed distinction between criminal and civil suits. However, in the remaining eight⁵ there is expressed limitation to criminal proceedings. Truth may be given in evidence in seven⁶ states in prosecutions for the publication of papers investigating official conduct of officers or men in public capacity, or where the matter published is proper for public information. It should be noted here that only official conduct is open to such discussion, and that comments on the private affairs of public officials are in no way privileged.

Similarly, twenty-three states have Constitutional provisions guaranteeing the right of the jury to determine the law and the fact, thus removing all doubt on the question which enlisted the efforts in England of Erskine, in America of

Ga. I Sec. II 1; Ill. II 4; Ind. I 10; Kan. B.R. 11; La. 179; Mo. II 14; Mont. III 10; Nebr. I 5; Nev. I 9; N.D. I 9; R.I. I 20; S.C. I 21; S.D. VI 5.

⁵ Ark. II 6; Cal. I 9; Mich. II 18; Miss. III 13; N.M. II 17; Ohio I 11; Okla. II 22; Utah I 15.

⁶ Ala. I 12; Ky. 9; Tex. I 8; Del. I 5; Me. I 4; Tenn. I 19; Pa. I 7.

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Andrew Hamilton and later of Alexander Hamilton. Eight ⁷ of these provisions are of general character, while fifteen ⁸ expressly cover criminal proceedings.

⁷ Colo. II 10; Conn. I 7; Miss. III 13; Mo. II 14; Mont. III 10; S.C. I 21; S.D. VI 5; Wyo. I 20.

⁸ Cal. I 9; Ga. I Sec. II 1; La. 179; N.J. I 5; N.Y. I 8; Utah I 15; Wis. I 3; Ala. I 12; Del. I 5; Ky. 9; Me. I 4; Pa. I 7; N.D. I 9; Tenn. I 19; Tex. I 8.

THE PRESENT STATUS OF QUALIFIED PRIVILEGE

WITH these Constitutional provisions in mind we shall take up first legislative and then judicial proceedings and discuss in detail the present status of qualified privilege in each of these two general subdivisions.

In England, parliamentary proceedings came to be privileged at common law after the trial of *Wason v. Walter*, but the privilege is qualified only, and is lost if the defendant acted maliciously in making and publishing the report. In all cases, the burden of proving that the occasion is privileged rests upon the defendant. This was definitely set forth in *Hebditch v. MacIlwaine et al.* (2 Q. B. 58) by Lord Esher, M. R., in 1894:

It is for the defendant to prove that the occasion was privileged. If the defendant does so, the burden of showing actual malice is cast upon the plaintiff; but unless the de-

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fendant does so, the plaintiff is not called upon to prove actual malice. The question whether the occasion is privileged, if the facts are not in dispute, is a question of law only, for the judge, not for the jury. If there are questions of fact in dispute upon which this question depends, they must be left to the jury; but when the jury has found the facts, it is for the judge to say whether they constitute a privileged occasion.

The privilege attaching to fair and true reports may be rebutted by proof of actual malice. No report of a legislative proceeding by whomsoever published is absolutely privileged; though, of course, it is very difficult to prove that an ordinary newspaper reporter has written his report through malice. Such is the common law in England.

In the United States the status of qualified privilege in reporting legislative proceedings is doubly insured, by many court decisions and by express provisions in our state Constitutions.

The open proceedings of any committee of the legislature are also privileged in England by the case of *Kane v. Mulvany*

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(Ir. R. 2 C. L. 402) which held that the proceedings of any committee of the House of Lords may be reported and commented upon. A similar decision was handed down in Louisiana in 1869 in the case of *Terry v. Fellows* (21 La. Ann. 375). It was held that a newspaper is not liable in damages for libel in publishing the testimony of witnesses given before an investigating committee of Congress; and, therefore, in giving publicity to such evidence through the newspapers, the privilege of the press is not abused. In another case, *Meteye v. Times-Democrat Publishing Co.* (47 La. Ann. 824), publication of proceedings of a committee of the city council was held to be privileged. But it was held in *Belo & Co. v. Wren* (63 Tex. 686) in 1884 that publication of a report of a committee appointed by the state legislature to sit after adjournment in order to investigate alleged land frauds was not privileged, because such proceedings were not regular legislative duties and the meetings were secret.

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England in 1840 enacted the Parliamentary Papers Act (3 & 4 Vic. 9) granting protection to persons employed in the authorized publication of parliamentary papers and proceedings or to those who printed extracts or abstracts of such papers. A like privilege arises where a newspaper publishes copies of notices, of which the Legislature has decided that an open record should be kept in the public interest, on the ground that the newspaper is thereby assisting the Legislature; but in order to be privileged such copy must be accurate.

Qualified privilege is now universally extended to fair and true reports of judicial proceedings.¹ In New York State the matter was definitely settled by the Statute of 1854, and other states in time followed suit. There still remains, however, some difficulty in defining the scope

¹ "A fair and truthful statement of a judicial proceeding is privileged". New York, 1909, *Perkley v. Morning Telegraph Company*, 131 App. Div. 599. Iowa, 1912, *Flues v. New Nonpareil Co.*, 155 Iowa 290. Ala., 1913, *Parsons v. Age-Herald Publishing Co.*, 181 Ala. 439.

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of judicial proceedings, and every decade since the passage of the New York Statute has brought its important decisions.

One of the most interesting illustrations of the change recently in the status of court reporting is to be found in two decisions in Missouri. In 1908 it was held in *Brown v. Globe Printing Co.* (213 Mo. 611) that while words reflecting on the character of an individual spoken in due course of a judicial or quasi-judicial proceeding, if pertinent to the issue, were privileged, that the publication of such defamatory words in a newspaper was not privileged, even though the publication was made in good faith and as a matter of news. Four years later in *Jones v. Pulitzer Publishing Co.* (240 Mo. 200) it was held, in the same state, that the publication of any fair and true report of judicial proceedings was privileged.

- A Michigan court, in 1878, held that the publication of court proceedings is not so far privileged as to justify a sensational

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accompaniment of defamatory comments upon the characters of those in relation to whom the proceedings are taken (*Scripps v. Reilly*, 38 Mich. 10).

In England the privilege was gradually evolved at common law, and then, to make doubly sure, Parliament included in the Law of Libel Amendment Act of 1888 the following provision (51 and 52 Vic. 64):

A fair and accurate report in any newspaper of proceedings publicly heard before any Court exercising judicial authority shall, if published contemporaneously with such proceedings, be privileged: provided that nothing in this section shall authorize the publication of any blasphemous or indecent matter.

This, in reality, added but little to the common law, which had slowly extended the terms of qualified privilege to include more and more legal procedure.

In 1878, for example, the English law extended qualified privilege to reports of proceedings before police magistrates or justices of the peace. In the case of

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Lewis v. Levy (E. B. & E. 537) the report of preliminary investigation before a magistrate was declared privileged. In *Duncan v. Thwaites* (3 B. & C. 556), however, it was held that such a report was not privileged if the accused was ultimately sent to trial before a jury, because such a publication might influence the jurors.

English law made an obvious distinction between an *ex parte* application where the accused had no opportunity of defending himself, and full trial where both parties addressed the court and called witnesses. Some judges held *ex parte* cases to be unprivileged; but Cockburn in *Wason v. Walter* expressed his clear opinion that a fair and accurate report of an *ex parte* application would be privileged. And the decision in *Usill v. Hales* (47 Law of Q. B. 323) in 1878 settled the law by extending immunity to all *bona fide* and correct reports of all proceedings in a magistrate's court, whether *ex parte* or otherwise.

New York in 1850 was strictly con-

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struing the law in the case of *Stanley v. Webb* (6 N. Y. Super. Ct. 21) when it held publication of *ex parte* preliminary proceedings before a police magistrate to be unprivileged.

American law on proceedings before a police magistrate closely approximates the English decisions—in fact the United States was generally advanced in its interpretation. The status of New York law was set by the Act of 1854, under which New York courts liberally interpreted the extent of qualified privilege. This is illustrated by the case of *Bissell v. Press Publishing Co.* (62 Hun. 551) in 1891, in which it was held that a proceeding before a police magistrate is a “judicial” proceeding within the Act of 1854, holding that the publishing in a newspaper of a fair and accurate report of judicial proceedings without malice is not actionable. A later instance is to be found in the decision of the New York Supreme Court in 1917 in the case of *Bresslin v. Sun Printing and Publishing Association* (177 App. Div. 92). Iowa

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in 1912 in the case of *Flues v. New Nonpareil Company* (155 Iowa 290) held police court proceedings to be privileged even though no legal record is kept. The law in Massachusetts was set in 1903 by the case of *Conner v. Standard Publishing Co.* (183 Mass. 474) where privilege was extended to proceedings in municipal courts even if the accused were discharged because the grand jury found no bill against him.

American practice in regard to justice of the peace cases generally follows that regarding police magistrates. Maryland in 1878 held that since under the provisions of the constitution Justices of the Peace were a part of the judiciary, proceedings before them are those of a public court of justice and reports thereof are entitled to the qualified privilege under the law of libel. These reports, the decision adds, must be substantially correct, and, together with the comments thereon, must be *bona fide* and without malice (*McBee v. Fulton*, 47 Md. 403). Another significant decision was that in the case of

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Beiser v. Scripps-McRae Publishing Co. (24 Ky. Law Rep. 259) in 1902. Here the judge held that an application to a Justice of the Peace for permit to make an affidavit for the purpose of instituting a prosecution is one step in a judicial proceeding, and, therefore, though such application be denied, a fair and impartial publication of the charge thus made is a privileged publication.

At this point it would be well to give several instances in which warrants and affidavits have been held unprivileged. It is in reporting such documents that the reporter now finds himself most in need of caution, for the matter is not settled, and the courts are, in general, still severe in their interpretation.

Ohio in 1857 held in the case of *Timberlake v. Cincinnati Gazette Co.* (1 Disn. 320) that the publication of matter contained in an affidavit and warrant on which an arrest was made was not justifiable as being a publication of judicial proceedings. A Louisiana newspaper in 1875, in publishing an affidavit filed in a

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criminal proceeding, made comments giving the impression that the matters sworn to were probably true; and the court held that the publication was not privileged (*Cass v. New Orleans Times*, 27 La. Ann. 214). The *St. Louis Dispatch* in 1877 lost a libel suit resulting from the publication of the contents of a divorce petition, for it was decided that such publication was not privileged merely because the paper had been filed (*Barber v. St. Louis Dispatch Co.*, 3 Mo. App. 377). In 1888 a Michigan court in *Park v. Detroit Free Press Co.* (72 Mich. 560) denied the privilege of publication of pleadings or other proceedings in civil cases, before trial. And the Delaware Superior Court in 1906 held that a preliminary affidavit filed for the purpose of procuring a writ of *capias ad respondendum* was not such a judicial proceeding that the publication of a fair and impartial report thereof was privileged within the law (*Todd v. Every Evening Printing Co.*, 62 A. 1089).

Other matters connected more with the

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police authorities than with the magistrate courts should be mentioned here, for there have been several attempts to extend qualified privilege in this direction. Such an attempt failed in Texas when the Court of Civil Appeal held in 1915 that the publication by the *Houston Chronicle* of an unwarranted arrest and imprisonment of a suspect on the suspicion of his connection with a murder committed in another state was not privileged as the publication of a proceeding in the administration of the law (*Houston Chronicle Publishing Co. v. Bowen*, 18 S. W. 61). On the other hand, a Missouri court in *Brown v. Globe Publishing Co.* held in 1908 that extradition proceedings before a Governor were quasi-public and hence privileged. Two other decisions, however, one in Louisiana, the other in New York, have shown clearly that the courts are not disposed to be lenient in the matter of reporting purely police news. In *Billet v. Times-Democrat Publishing Co.* (32 Sd. 17) reports of detectives to chiefs were held to be without

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privilege; and the New York Supreme Court in *Nunnally v. Press Publishing Co.* (110 App. Div. 10) declared the mere investigations of a detective character conducted by persons connected with the coroner's office, and by members of a municipal police force did not constitute judicial or other public and official proceedings.

The status of reporting grand jury proceedings is a matter of wide dispute. The states are almost evenly divided and decisions can be quoted on both sides. It can be laid down as a general rule that a report of the grand jury, after it is released, is privileged; but there is no uniform guide to other reports. A New York court in *McCabe v. Cauldwell* (18 Abb. Prac. R. 377) decided in 1865 that such reports were not privileged and were not included under the Statute of 1854. Iowa courts, however, had declared five years earlier that although a report of a grand jury under any part of the section 2992 of the Iowa Code was not a privileged communication, yet if the publica-

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tion was made in good faith and in the discharge of a supposed public duty, action for libel could not be sustained (*Rector v. Smith*, 11 Iowa 302). In recent years the Massachusetts courts have come out squarely and granted qualified privilege to such reports. In the case of *Sweet v. Post Publishing Co.* (215 Mass. 450) it was laid down that a fair and accurate report of an investigation and report by a grand jury was privileged in the absence of express malice, because such investigation and report constituted a judicial proceeding.

The manner of reporting these judicial proceedings is also important. Formerly, a full report was required and it was doubtful whether newspapers could give reports of trials from day to day. In England this was settled in *Kimber v. The Press Association* (1 Q. B. 65) when the court held that it was enough if there was a final decision "at one stage or other of the proceedings." Moreover, reporters need not wait till that stage was reached, but could report the proceedings

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at each stage; for, since every lawsuit must come to an end sooner or later, every step in every lawsuit taken in open court could be reported. Following this decision newspaper reporters could freely report everything that occurred publicly in open court without fear of any action, provided the reports were fair and accurate and not interspersed with their own comments. American law is the same. This was so held in *Brown v. Globe Printing Co.* (*supra*); though in that case it was definitely laid down that all comment must be deferred until the proceedings terminated.

The report need not be verbatim. Yet, while it may be abridged or condensed, it must not be partial or garbled. Reporters are not required to record all the proceedings, but they may not omit any fact which would have told in favor of any party; and, in case they do, the jury may decide whether such omission was material. The entire suppression of the evidence of one witness may render the report unfair. However, it should be re-

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membered that an accurate report of a portion of the judicial proceedings will still be privileged if it does not purport to be a report of the whole. In *Boogher v. Knapp* (97 Mo. 122) in 1888, it was held that a newspaper report, if abridged, must have no other effect on the character of the accused than would a verbatim report of the proceedings. In this connection also should be quoted the decision in the English case of *Milissich v. Lloyds* (46 J.J.C.P. 404) where it was held that the judgment or summing-up of the judge may always be separately published; for it is a distinct part of the proceeding not affected by any other, complete in itself and fairly severable from the rest; and also presumably a fair summary of the whole proceedings.

One important rule is common both to English and to American law. The reporter must add nothing of his own. He must not comment on the conduct of the parties, or impute motives to them, or charge that a particular witness committed perjury, since any of these things

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would destroy the defense of qualified privilege; although they might conceivably be defended on other grounds — either truth or fair comment. Two American cases may be cited to illustrate the tenor of the law on this point. The first — that of *Stanley v. Webb* (*supra*) — laid it down that the privilege was confined strictly to a report of the actual proceedings in court, which must contain nothing in addition to what forms strictly and properly the legal procedure. The second was an Illinois case of 1871 — *Storey v. Wallace* (60 Ill. 51) — in which privilege was denied to a statement made by a newspaper on its own authority and not purporting to be a report of proceedings of a court, although the paper offered to prove that the libel was in fact matter of evidence.

In the same connection, it should be remembered that libelous heads are not privileged, except they be a fair index. Here the law has been variously interpreted and is still somewhat unsettled. An important English case was that of

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Lewis v. Levy (E.B. & E. 537) in which suit was brought because a report of the hearing of a charge of perjury before a magistrate was headed "Wilful and Corrupt Perjury," and stated that the "evidence before the magistrate entirely negatived the story of the plaintiff." In this case the jury found for the defendant because it felt the report to be a fair and correct version of what occurred at the hearing; but the court set aside the verdict on this count, and entered a verdict for the plaintiff with nominal damages. This same construction was followed in America in *Thomas v. Croswell* (7 John. N. Y. 264) and *Commonwealth v. Blanding* (3 Pick. 20 Mass. 304).

There has been for many years a tendency on the part of the American courts to consider the headline on the basis of "a fair index." The federal case which touches this point is that of *Dorr. v. U. S.* (195 U. S. 138). In 1898 the New York Supreme Court held that headlines prefixed to a report of a judicial proceeding are privileged when they are a fair index

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of the matter contained in the report, and that they and the matter contained in the report must be construed together (*Lawyer's Cooperative Publishing Co. v. West Publishing Co.*, 33 App. Div. 585). The same court reiterated this interpretation in 1917 in the case of *Bresslin v. Sun Printing and Publishing Co.*

There are two circumstances which may remove the qualified privilege from reports of judicial proceedings no matter how fair and accurate they may be.

The first arises when the court has itself prohibited the publication, as it frequently did in former days. This is especially true of the English courts, where Lord Justice Turner in *Brook v. Evans* (29 L. J. Ch. 616) laid it down that "every court has the power of preventing the publication of its proceedings pending litigation." A Tennessee court in 1906 in *American Publishing Co. v. Garble* (115 Tenn. 663) held that unless the court has itself prohibited the publication or the subject matter be unfit for publication a newspaper is entitled to

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publish a fair and reasonable report. A similar exception was made in 1912 by an Iowa court in the case of *Flues v. New Nonpareil Co.* Several of the state constitutions make this exception. But nowadays it is rare indeed when a court enforces this power, and it is never done in New York under the Act of 1854.

The second is the more common restriction — where the subject matter of the trial is an obscene or blasphemous libel, or where for any other reason the proceedings are unfit for publication. It is not justifiable to publish even a fair and accurate report of such proceedings; such a report will be indictable as a criminal libel. The leading English case on this point is that of *Rex v. Mary Carlile* (3 B. & Ald. 167) in 1819. Richard Carlile had been indicted for selling Paine's *Age of Reason*. At the trial he read over to the jury the whole of the condemned book; and after his conviction his wife published a full, true and accurate account of his trial under the title of *The Mock Trial of Mr. Carlile*, and included

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in it the whole of the *Age of Reason* as a part of the proceedings of the trial. The court held that qualified privilege did not extend to the reproduction of the book which the jury had found a blasphemous libel; and that, therefore, it was unlawful to publish even a correct account of scandalous, blasphemous or indecent nature.

With these two exceptions, fair and accurate accounts are qualifiedly privileged in cases deemed judicial proceedings.

One limitation should be pointed out, however — the privilege is not absolute, but only qualified. That is to say, if malice is proven, the privilege is lost; but it is for the plaintiff to prove that the report or publication was published maliciously. It has been held in some jurisdictions that if the plaintiff can prove, for example, that the defendant has been requested to insert in his paper a reasonable letter or statement of explanation or contradiction and has refused to do so the privilege is lost, and the court will regard

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such refusal as admissible evidence of malice.

What is "malice"? Malice cannot be exhaustively defined; but it may be described as any improper motive which induces the defendant to defame the plaintiff. Lord Campbell, C. J., held in the case of *Dickson v. Earl of Wilton* (1 F. & F. 427) that "any indirect motive, other than a sense of duty, is what the law calls 'malice.'" The distinction between the legal and popular conception of malice was clearly set forth by Lord Justice Brett in *Clark v. Molyneux* (3 Q. B. D. 246):

When there has been a writing or a speaking of defamatory matter, and the judge has held—and it is for him to decide the question—that although the matter is defamatory the occasion on which it is either written or spoken is privileged, it is necessary to consider how, although the occasion is privileged, yet the defendant is not permitted to take advantage of the privilege. If the occasion is privileged it is so for some reason, and the defendant is only entitled to the protection of the privilege if he uses the occasion for

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that reason. He is not entitled to the protection if he uses the occasion for some indirect and wrong motive. If he uses the occasion to gratify his anger or his malice, he uses the occasion not for the reason which makes the occasion privileged, but for an indirect and wrong motive. If the indirect and wrong motive suggested to take the defamatory matter out of the privileged is malice, then there are certain tests of malice. Malice does not mean malice in law, a term in pleading, but actual malice, that which is popularly called malice. If a man is proved to have stated that which he knew to be false, no one need inquire further. Everybody assumes thenceforth that he was malicious, that he did do wrong thing for some wrong motive. So if it be proved that out of anger, or for some other motive, the defendant has stated as true that which he does not know to be true, and he has stated it whether it is true or not, recklessly, by reason of his anger or other motive, the jury may infer that he used the occasion, not for the reason which justifies it, but for the gratification of his anger or other indirect motive.

. Evidence of malice may be of two kinds. First, it may be extrinsic, and the plaintiff proves that there was previous

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ill-feeling or personal hostility, threats, rivalry, squabbles, former libels or slanders, etc. Or, it may be intrinsic, and the evidence may then consist of the degree of violence of the defendant's language and and the mode and extent of its publication. In this connection we have recourse once more to the case of *Brown v. Globe Printing Co.* (*supra*) where it was held that suppression of parts of testimony is evidence of malice. To these general kinds of evidence of malice several exceptions should be noted. Mere inadvertence, forgetfulness, careless blundering, want of sound judgment, words written or published through honest indignation, do not constitute evidence of malice. Nor is malice proven by the use of strong words, if from the defendant's view of the facts strong words were justified.

Despite these favorable decisions, it is plain that the problem is not definitely settled to the satisfaction of the newspaper man. Several questions are still in doubt. One arises when public benefit and personal malice coincide. Which

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shall have preferment? This problem was neatly put in the course of the trial of *Stevens v. Sampson* by Bramwell, B: (5 Ex. D. 56) in 1879:

Suppose a reporter for the press bore malice towards a person, a party to an action, and published a fair report of the proceedings injurious to him, I incline to think that, as he would be performing a kind of duty, it ought to be taken that he is acting under privilege. However, I only throw this out as a suggestion, and it is unnecessary to decide the point.

To Odgers, however, this seemed unsupportable, and he felt that the reporter should be held liable because he acted maliciously. He went on to add that in an action against the editor or the proprietor, the malice of the reporter would be immaterial, since the plaintiff would have to prove malice in the actual defendant.

But even this distinction does not settle the larger problem: if the report is for the public benefit, should malice prevent its publication? Under the present status of the law, both in England and in the

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United States, privilege is immediately lost on the proof of malice, and the publisher is forced to find his defense on other grounds, the most common being that of fair comment and criticism, if he cannot prove the truth of the defamatory imputation.

QUALIFIED PRIVILEGE A REQUISITE OF DEMOCRACY

THIS third great right of the press ranks with qualified privilege in importance. Not only should the newspapers be able to give fair and accurate accounts of legislative debates and judicial proceedings, but also they should be able to point out the underlying tendencies, the motives and the results of such acts. The fight for fair comment centered, at first, largely around the right of petitioning. It soon came to be recognized at common law that all who witnessed any misconduct on the part of a magistrate or any public officer should report it to those whose duty it was to inquire into and punish it. Hence arose the privilege attached to all petitions and memorials complaining of misconduct.

There are, however, four major restrictions on the use of the right of criticism and fair comment; first, the matter dis-

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cussed must be of genuine public interest; second, the publication must be an expression of opinion and not an assertion of fact; third, the published words must be in the nature of fair comment; and finally, the criticism must have been published without malice. These should be taken in connection with the opinion of the court in *Lefroy v. Burnside* (4 L. R. Ir. 565):

That a fair and *bona fide* comment on a matter of public interest is an excuse of what otherwise would be a defamatory publication is admitted. The very statement, however, of this rule assumes the matters of fact commented upon to be somehow or other ascertained. It does not mean that man may invent facts, and comment on the facts so invented in what would be a fair and *bona fide* manner on the supposition that the facts were true. . . . If the facts as a comment upon which the publication is sought to be excused, do not exist, the foundation of the plea fails.

Qualified privilege easily merges with the right of fair comment and criticism. At first, they were scarcely distinguished,

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and throughout the whole struggle they were fought for without discrimination. Both have won an essential place in democracy.

More and more, as the press takes its rightful place in modern society, is qualified privilege coming to be recognized as the equal of its older brother, absolute privilege. Both are requisites in liberal governments, both correlate each other, and should act as a check upon each other.

The need of some sort of a check upon absolute privilege is now widely felt. No better illustration of the lengths to which legislators and public officials will carry this liberty need be sought than the thousand and one incidents of defamatory libels proclaimed during the oil scandal investigations of 1924 by the United States Senate. Every form of charge was made, often with seemingly reckless disregard of the consequences, by Senators, by public officials, and by witnesses, all secure in the absolute privilege guaranteed them under legislative procedure. The majority of these instances

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of abuse of absolute privilege were made with the fundamental hope that the press would publish them, since they were intrinsically political statements or bids for personal publicity. And yet, it can still be maintained that more defamatory statements might have been made, that more unfounded charges might have been entered, that more untrue accusations and implications might have been bandied about, had not there been the constant threat that the inevitable publication of such libels in the press (protected by qualified privilege) would react upon the libelors. In one instance at least, a libel against President Harding was followed by immediate suit, and the publicity given both the libel and the resulting legal action served to warn certain libelors and to arouse adverse public opinion.

This is but an example of the intricate interlacing of qualified privilege with the other corollaries of freedom of speech. First in point of time, came absolute privilege, because the only weapons of the people in their fight against despotism

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were the legislature and the courts, so that at length these two were granted the right to say and do what they would without being responsible to a superior power. And then came the popular uprising against the arbitrary power which the courts and legislature, after wresting it from the king, had usurped for themselves, often in direct contradiction to the wishes of public opinion. The specific points of this fight we have already referred to — trial by jury, freedom of petitioning and assembly, truth as defense in libel trials, qualified privilege, publication of parliamentary debates — all inextricably intertwined and all won through the same long struggle. Thus popular opinion came to dominate legislation and court decisions, with qualified privilege one of its greatest agents.

At last, qualified privilege is recognized as one of the prime requisites of freedom of speech. Without it the government could become despotic and work in obscure ways. At first, qualified privilege was bitterly fought on the ground that it

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would be detrimental to society for everyone to know what took place in the halls of the legislature and in the court room. This fallacy has been so long exploded that it deserves no further comment here. Another point put in opposition to qualified privilege was the charge that were the doors thrown open and all allowed to print reports of public and official proceedings, falsehoods and inaccuracies would abound and even take precedence. Milton pointed out the fundamental fallacy of such a doctrine in his *Areopagitica*, that eloquent but vain appeal for freedom of speech and liberty of opinion in the time of the English Commonwealth:

And though all the winds of doctrine were let loose to play upon the earth, so Truth be in the field, we do injuriously by licensing and prohibiting to misdoubt her strength. Let her and Falsehood grapple; who ever knew Truth put to the worse, in a free and open encounter?

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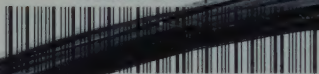
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